IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-264

* * *

ROBERT K. SWISHER, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its duly authorized Attorney General, and files this its Brief in Opposition.

QUESTIONS PRESENTED

I. Whether there was a contitutionally impermissible delay in bringing the Petitioner to trial.

II. Whether the search of Petitioner's vehicle and subsequent seizure of contraband was impermissible under the Fourth Amendment to the Constitution of the United States.

STATUTES INVOLVED

1. The Fourth Amendment to the Constitution of the United States.

2. The Fifth Amendment to the Constitution of the United States.

3. The Sixth Amendment to the Constitution of the United States.

4. The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Robert K. Swisher, Jr., Petitioner herein, was arrested on October 12, 1970 for possession of marijuana. He was released on a surety bond in the amount of $7,500.00. A preliminary hearing was apparently conducted on or about October 28, 1970, at which time a justice of the peace found no probable cause for arrest.

On November 19, 1970, the case was presented to the Grand Jury of El Paso County, Texas. They returned an indictment for possession of marijuana. A precept to serve copy of indictment and a capias for arrest were issued on November 19, 1970. A notation was made on the capias by the Deputy Sheriff that the Petitioner was continued on bond. The precept was returned unserved on the Petitioner.

Petitioner was set for arraignment in the 34th Judicial District Court of El Paso County, Texas on

December 4, 1970. Petitioner did not appear and his bond was forfeited. In December of 1973, it was learned by the District Attorney's Office that Petitioner was in New Mexico. At that time, an effort was made to bring Petitioner back into the jurisdiction of the court. An alias capias was issued on January 16, 1974. Petitioner surrendered himself and was released on a new bond on March 18, 1974. He waived arraignment on March 21, 1974. He entered a plea of not guilty and proceeded to trial before a jury on June 17, 1974. Petitioner was found guilty and punishment was assessed by the jury at not less than two years nor more than seven years in the Texas Department of Corrections.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. The conviction was affirmed in, *Swisher v. State.* (No. 50,099, Delivered May 26, 1976).

STATEMENT OF FACTS

On October 12, 1970, Texas Department of Public Safety Officer Napoleon Herrera received information from an undisclosed informant that Robert Swisher would be receiving a quantity of marijuana in the Fabens, Texas area on the evening of October 12 or October 13. The informant further related that the Petitioner had long hair, a slender build and would be driving a white Rambler station wagon or pickup truck. Agent Herrera related this information to another Department of Public Safety unit and proceeded to set up a surveillance at the Fabens exit off Interstate 10 outside of El Paso, Texas. Agent Herrera was in an unmarked car.

While observing the east-bound traffic, Herrera noticed a white Rambler station wagon traveling east with a driver who fit the description given by the informant. He proceeded to follow the staion wagon as it

went south on FM 793 toward Fabens, Texas. While following the vehicle, he was able to see that it was empty of cargo at that time. Agent Herrera discontinued the surveillance as the vehicle approached Fabens.

Approximately thirty minutes later, Agent Herrera again observed the vehicle now headed north from Fabens. He pulled in behind the vehicle and followed it onto Interstate 10 heading west toward El Paso. He then informed the other Department of Public Safety unit of his location. The DPS patrol unit came up behind Agent Herrera and he then pulled alongside the station wagon on the left. He observed numerous packages approximately 2-1/2 to 3 inches thick, 5 inches wide and 7 to 8 inches long wrapped in cellophane and brown paper in plain view in the rear of the vehicle. From his experience Agent Herrera judged these packages to contain marijuana. Herrera dropped behind the vehicle and the patrol unit pulled alongside the station wagon and stopped it. The officers then approached the vehicle. The driver was identified as Robert K. Swisher, Jr., the Petitioner. Agent Herrera examined one of the packages and determined that it contained marijuana. Petitioner was then placed under arrest for possession of marijuana. A subsequent chemical analysis showed the 127 packages to contain 263.9 pounds of marijuana.

ARGUMENT AND AUTHORITIES

I.

The Delay in Bringing Petitioner To Trail Was Not Constitutionally Impermissible.

The balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972), should be applied to the case at bar. The four main factors to be considered are length of delay, the reason for delay, the Defendant's assertion of his right,

and prejudice to the Defendant.

Length of Delay

Petitioner was arrested on October 12, 1970. He was released on a $7,500.00 surety bond the next day. He was indicted on November 19, 1970 and failed to appear for arraignment on December 4, 1970. A judgment nisi forfeiting his bond was issued on January 20, 1971. Petitioner surrendered himself on an alias capias in March of 1974. He waived arraignment and was set for trial in June of 1974. On June 11, 1974, the Petitioner made a motion for a speedy trial. The trial was held on June 17, 1974.

Reason For Delay

Although Petitioner contends that he had no knowledge of the indictment, he was on a surety bond at the time the indictment issued. The indictment was a public record. Since the Petitioner was on bond at the time of his indictment, his bondsman was the party responsible for seeing that he appeared in court. When Petitioner failed to appear for his arraignment, his bond was forfeited. The State at that time considered Petitioner as a fugitive from justice and, upon learning of his whereabouts in a foreign state in December of 1973, the State initiated proceedings to bring him back within the jurisdiction of the court. Thus, the delay cannot be considered attributable to the State. Unlike the fact situation in *Dickey v. Florida*, 398 U.S. 30 (1970), and *Moore v. Arizona*, 414 U.S. 25 (1973), the State had no knowledge of the whereabouts of Petitioner until December, 1973. Once back in the jursdiction of the court, the State proceeded to trial within four months.

Prejudice To The Defendant

Three interests to be looked at as prejudicial to the

Defendant are: (1) To prevent oppressive pre-trial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Petitioner was out on bond and was not incarcerated. Further, Petitioner testified that he suffered no anxiety or concern since he believed the charges to have been dismissed.

Petitioner contends, however, that he was prejudiced in not being able to present defense witnesses. He testified that he believed he was only hauling alfalfa, which was to be sold as marijuana. The two parties whom he alleged could corroborate his defensive theory were a man named Henry and a man named Clay Melton. Petitioner has not shown any diligence in trying to obtain the testimony of these witnesses. Petitioner stated at the pre-trial hearing that he knew Henry well, but could not remember if his last name was Garcia, Hernandez or Gonzales. He further stated that he went to the house where he had picked up the marijuana from Henry and asked in English, "Is Henry here." The woman who answered the door replied in Spanish and Petitioner was unable to determine what she said. As to Clay Melton, although allegedly a close friend of Petitioner, his only effort in trying to locate him was a search of the phone book and a visit to a house where Melton's mother once lived. No subpoena was requested for either one of these witnesses. Petitioner also testified that he was unable to locate the whereabouts of two professors as character witnesses who were no longer at the University of Texas at El Paso. He did not set forth any way that he tried to locate these professors. In weighing all of these factors, it is evident that the prejudice to Petitioner was minimal.

Striking The Balance

When the conduct of both the State and the Petitioner

is evaluated, it is apparent that the balance should be struct in favor of the State. There is no question that a lengthy delay between indictment and trial occurred. However, this delay cannot be attributed to the State. From the time Petitioner failed to appear for arraignment until his re-arrest, he was considered by the State as a fugitive from justice. There is no evidence of any inquiries made by either Petitioner or his attorney as to the charges that had been brought against him. Once Petitioner was brought back within the jurisdiction of the court, he was tried in four months. Further, the record refutes Petitioner's contention that his defense was impaired as a result of the delay. It is highly unlikely that the jury would have believed his story that he was hauling alfalfa even if corroborated by the other two men who supposedly hired him. It is also unlikely that even if available to testify, they would have appeared since their testimony would have been self-incriminating. The delay in this case was far more likely to benefit Petitioner than to harm him. The State's case was dependent upon the testimony of Agent Herrera. Had he not been available for trial, the State's case would have been destroyed. Respondent therefore contends that under the rationale of *Barker v. Wingo, supra*, Petitioner was not deprived of his due process right to a speedy trial.

II.

The Surveillance By the Law Enforcement Officers Established Probable Cause For The Search And Arrest.

As set forth in the Statement of Facts, the law enforcement officers conducted a thorough surveillance of the vehicle. Agent Herrera observed the empty vehicle described by the informant approach Fabens, Texas. The vehicle, on its return from Fabens, was

loaded with packages which, from Agent Herrera's experience, appeared to be marijuana. This surveillance, coupled with the informant's tip, constituted sufficient probable cause for a search of the vehicle. *See, United States v. Waddey*, 436 F.2d 632 (5th Cir. 1976).

The search of an automobile is far less instrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). While traveling on a public thoroughfare, a car is subject to public view. What a person knowingly exposes to the public is not subject to Fourth Amendment protection. *Katz v. United States*, 389 U.S. 347 (1967).

The thrust of Petitioner's argument goes toward the reliability of the informant. This approach ignores the surveillance by the officers which not only corroborated the informant's tip, but led to personal observation of criminal activity. *See, Draper v. United States*, 358 U.S. 307 (1957). Having probable cause for the stop, the search without warrant was permissible. *Chambers v. Maroney*, 399 U.S. 42 (1970).

The surveillance of Petitioner and observations by the peace officers provided more than adequate probable cause for the stop, search and subsequent arrest.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anita Ashton, Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States mail, first class, certified and postage prepaid, on this the ____ day of November, 1976, addressed to: Joseph (Sib) Abraham, Jr., Attorney for Petitioner, 505 Caples Building, El Paso, Texas 79901.

ANITA ASHTON
Assistant Attorney General